The Case for Discretionary Clauses In ERISA Plans

Business and Labor Interim Committee

Utah Legislature

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Background

Employer Plan Fiduciaries must:

1) Follow the governing plan documents; and
2) Comply with robust claims and appeals requirements
3) That were recently further strengthened by ObamaCare.

Discretionary Clauses: The Idea

Give deference to the decisions of employer plan fiduciaries in order to:

1) Protect employer plans from the expense of burdensome litigation; and
2) Keep premiums affordable.

The Idea

If the plan gives the fiduciary discretionary authority to determine eligibility for plan benefits or to construe the terms of the plan, then use an "abuse of discretion" (arbitrary and capricious) standard when those determinations are challenged in court.

The Idea

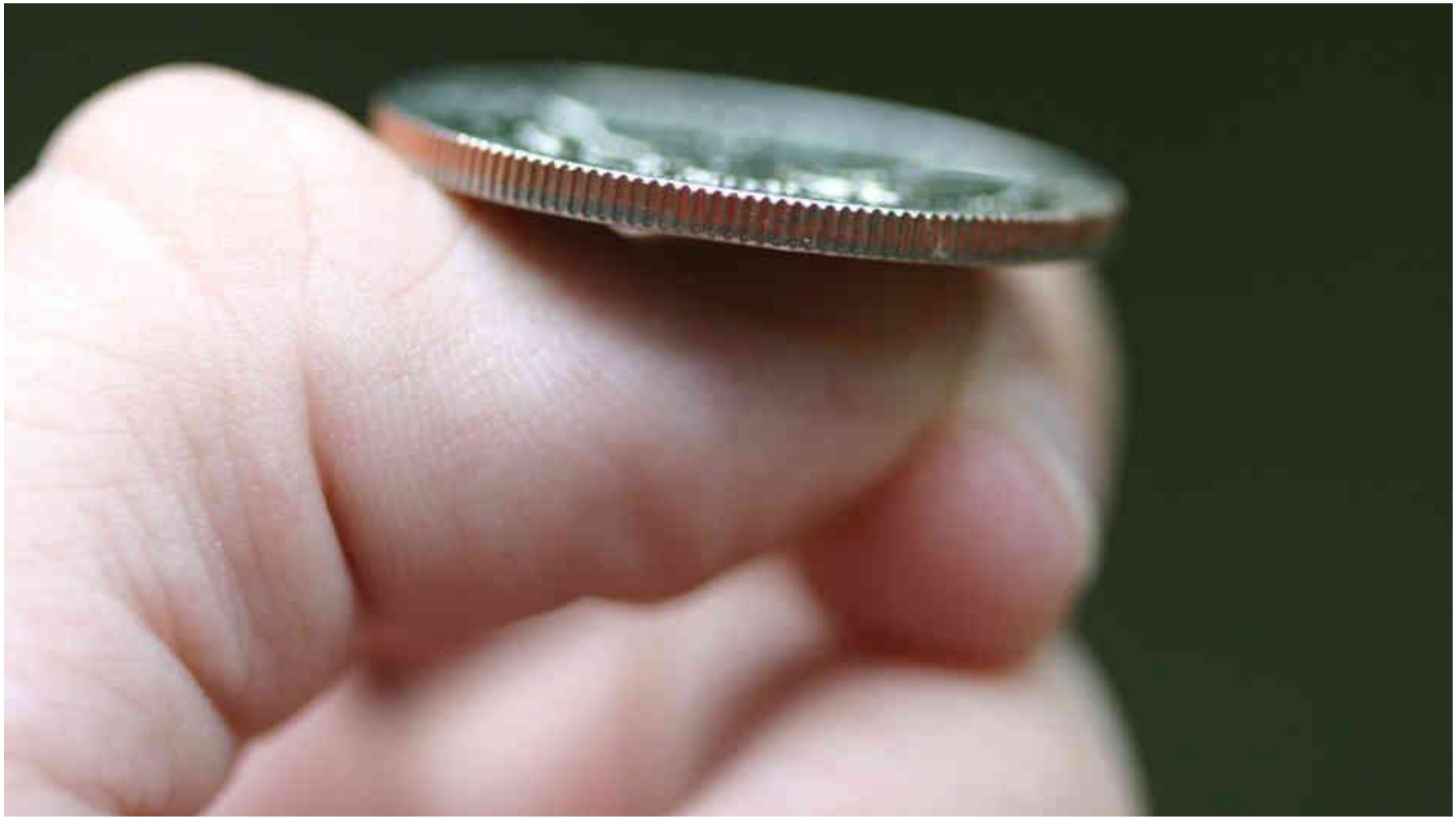
If the plan doesn't give the fiduciary discretionary authority, then use a "de novo" standard when those determinations are challenged in court.

Everyone Agrees: the Standard of Review Matters!

Standard of Review

Abuse of Discretion (Arbitrary and Capricious)

- Uphold the plan fiduciary's decision if there is a "reasonable basis" for it.
- It need not be the only logical decision or even the best decision.
- But the decision does have to be "sufficiently supported by the facts."



Toss Ups Go to the Employer Plan

Standard of Review

De Novo

No deference is granted to the plan fiduciary. The court gets to the re-make the decision fresh.

- Simply put, does it agree or disagree with the plan fiduciary's decision?
- Much lower standard; Much more attractive to plaintiff's attorneys.

Three Key Points

Barring these clauses is anti-business because it:

1) Takes away employer choice

2) Encourages litigation

3) Increases premium

1. Takes Away Employer Choice

These clauses are permissive. They are not required. ERISA allows plans to do this by placing the relevant provision in the plan document or policy—thereby putting employees on notice.

1) It represents an employer choice—to reduce litigation and, therefore, cost/premium.
2) Barring the provision takes away the choice.

2. Encourages Litigation

Many of these decisions are gray. There is often a reasonable basis for deciding either way. Allowing the Court to simply second guess the employer plan fiduciary's decision will result in a significant increase in litigation.

1) Barring these clauses is pro-litigation.
2) It is the opposite of Tort Reform.

3. Increases Premium

Increased litigation cost is passed on to businesses and their employees in the form of increased premium.

1) The ACA has already created unprecedented upward pressure on health plan premiums.
2) Small business is particularly vulnerable.
3) Barring these clauses would further erode employer health coverage.

Caution: Straw Man Crossing!

Watch Out for Straw Men!

We are only talking about private employer-sponsored (i.e., ERISA) plans.

1) Discretionary clauses are already barred in all other insurance policies!
2) See Rule 590-218

Watch Out for Straw Men!

These clauses do not grant the insurance company "unfettered authority"

1) The discretionary deference does **not** justify bad faith.
2) It does **not** justify determinations without a "reasonable basis".

Reasons not to Bar Discretionary Clauses

Three Count Anti-Business Indictment—

1) It will take away employer choice.

2) It will encourage and increase litigation.

3) It will increase premium and further erode employer coverage.

Questions?